

**MALAYAN BANKING BHD v. JS VALUERS PROPERTY
CONSULTANT (JOHORE) SDN BHD & ORS**

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HIGH COURT MALAYA, MUAR
SURIA KUMAR DJ PAUL JC
[SUIT NO: 22NCC-6-09-2016]
16 NOVEMBER 2023

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Abstract – (i) A valuer must take reasonable care to give a reliable and informed opinion on the market value of a land in question at the date of valuation; (ii) A solicitor is not guilty of negligence if he has merely acted upon his client's instructions in the reasonable belief that they were correct or if he has fully explained the position to his client and is nevertheless instructed to proceed; (iii) A solicitor is entitled to act for two parties in a transaction even where their interests might conflict, provided he has obtained the informed consent of both parties to his action.

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BANKING: Bank and banking business – Banking facility – Bank's claim against chartered surveyors and registered valuers and solicitors – Claim based on tort of negligence – Whether negligence proven – Whether there were breaches of contractual obligations and duty of care

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TORT: Negligence – Professional negligence – Claim for – Bank's claim against chartered surveyors and registered valuers – Negligence – Claim that surveyors and valuers wrongfully, negligently and/or fraudulently prepared valuation reports for properties when actual market value substantially lower – Whether surveyors and valuers breached duty of care – Whether bank successful in establishing claim against surveyors and valuers

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TORT: Negligence – Professional negligence – Claim for – Bank's claim against solicitors – Claim that surveyors and valuers wrongfully, negligently and/or fraudulently prepared valuation reports for properties when actual market value substantially lower – Whether solicitors wrongfully and/or negligently advised bank to release banking facilities to borrower – Whether solicitors failed to ensure documents complied with bank's requirements and failed to examine borrower's documents carefully – Whether failed to protect bank's interest – Whether solicitors breached contractual duties and duty of care owed to bank – Whether there was conflict of interest

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The plaintiff was a licensed financial institution under the Financial Services Act 2013. The first defendant was a company of chartered surveyors and registered valuers. The second defendant was a chartered surveyor and registered valuer, and a director of the first defendant. The third defendant was a firm of solicitors. The second defendant was the panel valuer while the third defendant was the panel solicitor of the plaintiff. This action arose from two banking facilities that were granted and released by the plaintiff to one

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- A KW Kelly Wood Trading Sdn Bhd ('borrower'), comprising an overdraft, term loan and letter of credit. The first and second banking facilities were each in the amount of RM4.8 million and RM12 million for the purchase of two units of factories ('Taman Wawasan properties') and four units of industrial buildings ('Sri Sulong properties'). The first and second defendants were appointed by the plaintiff to prepare valuation reports for both the Taman Wawasan and Sri Sulong properties in respect of the said banking facilities. The third defendant, on the other hand, was appointed by the plaintiff to prepare the loan documentation. The plaintiff's claim against the defendants was: (i) the first and second defendants had wrongfully, negligently and/or fraudulently prepared valuation reports, stating that the market value for the Sri Sulong properties was RM12 million and for Taman Wawasan properties was RM3.2 million when in fact, the actual market value was substantially lower; (ii) the evidence of the first and second defendants having overvalued the Sri Sulong properties by 208% and the Taman Wawasan properties by 78% amounted to conclusive and decisive evidence of fraud; (iii) in the alternative, the first and second defendants grossly, deliberately and unreasonably inflated the valuations and there was no reasonable basis for their valuation; (iv) the first and second defendants had breached the duty of care owed to the plaintiff as their panel valuer; (v) the third defendant, in their capacity as solicitors for the plaintiff had, *inter alia*, wrongfully and/or negligently advised the plaintiff to release the banking facilities to the borrower, knowing that the plaintiff would rely on their advice; (vi) the third defendant failed to ensure that the documents prepared by them complied with the plaintiff's requirements and failed to examine the borrower's documents carefully to protect the plaintiff's interest before advising the release of the banking facilities to the borrower; and (vii) the third defendant had breached its contractual duties and duty of care owed to the plaintiff under the service-level agreement.

Held (allowing claim against first and second defendants; dismissing claim against third defendant):

- G (1) The plaintiff failed to prove fraud on the balance of probabilities against the first and second defendants. There was no evidence to substantiate the allegations of fraud by the first and second defendants. However, the plaintiff had succeeded, on the balance of probabilities, to prove that the first and second defendants had grossly inflated the valuation of the Sri Sulong and Taman Wawasan properties, which indicated want of proper standard of care and duty on their part owed to the plaintiff. The failure by the first and second defendants to adhere to the relevant standards in the Malaysian Valuation Standards, to adopt the correct and similar sales evidence and to apportion the market value correctly led to gross over-valuation of the properties. There was a lack of proper standards of care in the preparation of the reports for the Sri Sulong and Taman Wawasan properties on the part of the first and second defendants. They

failed to exercise reasonable care in determining the true open market value of these properties. The first and second defendants were not careful and honest in the preparation of the reports. As a result, the value of these properties were inflated and did not reflect the true open market value at the material time. The first and second defendants, in valuing the properties, ought not to place reliance on the transacted price of the properties in the sale and purchase agreements and adopt the transacted price as the open market value, without carrying out a proper valuation to satisfy whether the plaintiff's condition precedent on the minimum open market value as security for the banking facilities was met. Based on the purpose for which the valuation was sought by the plaintiff, surely the first and second defendants would have known that the valuation reports prepared by them would be acted upon by the plaintiff and that the plaintiff would rely on the special skills possessed by the first and second defendants. (paras 80, 81, 84, 87, 88, 89, 90 & 94)

- (2) The third defendant had nothing to do with the valuations. They had no connection or involvement with the first and second defendants in respect of the valuation for the Sri Sulong and Taman Wawasan properties. The plaintiff (i) knew the borrower's and vendor's directors and shareholders were all related and had been the bank's customers for several years; (ii) had the opportunity to verify and could have verified with the borrower concerning their relationship with the vendor company; and (iii) could have investigated on their own as to the relationship between the borrower and the vendor company by doing the necessary searches and checking with the Companies Commission of Malaysia. Further, the third defendant was appointed after the plaintiff had approved and granted the banking facilities to the borrower. As such, it was certainly not within the ambit of the third defendant's duty to advise the plaintiff after the plaintiff had already decided to grant the banking facility to the borrower. The plaintiff suffered losses as a result of the inflated valuation of the properties by the first and second defendants and not as a result of the third defendant's negligence in breach of their duties and obligations under the service-level agreement when advising the release of the banking facilities. The plaintiff failed to prove causation between the purported breach of the expected conveyancing practice under the service-level agreement in advising the plaintiff to release the banking facilities and the losses suffered as a result of the inflated valuation of the properties. Furthermore, the plaintiff did not adduce any evidence on the established conveyancing practice with regards to the standard of care when advising financial institutions to release banking facilities by calling practising lawyers. (paras 126, 143-145 & 166-168)

- A (3) According to the plaintiff, the conflict of interest arose when the third defendant acted for the plaintiff concerning the loan documentation and also acted for the borrower in the preparation of the sale and purchase agreement. However, the borrower was introduced by the plaintiff themselves to them as their panel solicitor and the third defendant was only retained to prepare documents for the loan obtained by the borrower. The plaintiff, by introducing the borrower to the third defendant and continuing to instruct the third defendant for the preparation of the loan documents, had shown that the plaintiff acknowledged the possible conflict which might arise and consented to the continuation of the relationship between the third defendant and the plaintiff. There was no merit in this issue raised by the plaintiff. The plaintiff was estopped from raising that the third defendant ought not to have acted in preparation of the loan documents after the plaintiff themselves had introduced the borrower and instructed the third defendant to prepare the loan documents. Further, it was also common practice and norm in the banking industry in Malaysia that financial institutions only allow borrowers to appoint solicitors who were on their panel to prepare loan documentation. (paras 131, 133, 137 & 138)
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- C
- D
- E (4) The plaintiff had commenced a similar suit against the third defendant based on a similar cause of action herein. Before the commencement of the said suit, a debt recovery action was filed against the borrower in that case. The third defendant had prepared the loan documentation for the plaintiff in respect of the borrower in that case. The doctrine of judicial estoppel applied against the plaintiff for bringing this claim premised on the loan documentation prepared by the third defendant after having successfully relied on the same documents against the borrower and the guarantors in their debt recovery action. (paras 178 & 187)
- F
- G (5) The plaintiff must be held equally liable for the losses suffered by them as a result of the difference between the valuation arrived by the first and second defendants and the true open market value. In the case of the Sri Sulong properties, the liability of the first and second defendants for the difference of RM5.4 million was to be reduced by 50% to RM2.7 million whereas in the case of the Taman Wawasan properties, the liability of the first and second defendants for the difference of RM1.4 million was to be reduced by 50% to RM700,000. (paras 214-216)
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Obiter:

- I (1) Advocates and solicitors should refrain from the practice of drawing up two separate agreements for different considerations to pay lesser stamp duty instead of paying the due stamp duty to the Government based on the market value. (para 129)

Case(s) referred to:

Alliance Bank Malaysia Bhd v. Yap Koo Kong & Ors (Civil Suit No: K22-101-2005-II)
(Unreported) (*refd*)

Amzed Development Sdn Bhd v. Dato' Mat Jahya Hussin & Anor [2021] 5 CLJ 149 CA
(*refd*)

Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd [1992]
2 CLJ 1175; [1992] 2 CLJ (Rep) 109 HC (refd)

Bank Bumiputra Malaysia Bhd v. Yeoh Ho Huat [1977] CLJU 11; [1977] 1 LNS 11
HC (refd)

Bank Kerjasama Rakyat Malaysia v. Daya Plaza Sdn Bhd; Empire Possession Sdn Bhd
(Intervener) [1998] 5 CLJ 79 HC (refd)

Banque Bruxelles Lambert SA v. Eagle Star Insurance Co Ltd [1995] 2 All ER 769 (refd)
Baxter v. FW Gapp & Co Ltd [1938] 4 All ER 457 (refd)

Clark Boyce v. Mouat [1993] 4 All ER 268 (refd)

JLA Motorsports Sdn Bhd lwn. Ahmad Suhaimi Abdullah & Yang Lain [2020] CLJU
689; [2020] 1 LNS 689 HC (refd)

Kesang Leasing Sdn Bhd v. Tetuan Zul Rafique & Partners [2014] CLJU 362; [2014]
1 LNS 362 HC (refd)

Khoo Cheong Puay v. The Oversea Chinese Banking Corporation Ltd & Ors [1935] CLJU
26; [1935] 1 LNS 26 HC (refd)

Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors [2017] CLJU 499;
[2017] 1 LNS 499 CA (refd)

Neogh Soo Oh & Ors v. G Rethinasamy [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC
(*refd*)

Ng Shiuh Huei v. Asset First Sdn Bhd & Anor [2014] 3 CLJ 1064 HC (refd)

Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA (refd)

Syarikat Rodziah v. Malayan Banking Bhd [2021] 5 CLJ 170 CA (refd)

Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA (refd)

U Television Sdn Bhd & Anor v. Comintel Sdn Bhd [2017] 10 CLJ 580 FC (refd)

Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd [2011] CLJU 1853; [2011]
1 LNS 1853 CA (refd)

Legislation referred to:

Rules of Court 2012, O. 40A

Other source(s) referred to:

Halsbury's Laws of England: The Law of Solicitor's Negligence, Reissue, 4th edn,
para 153

For the plaintiff - Christopher Arun & Long Jie Ren; M/s Ariff Rozhan & Co

For the 1st & 2nd respondents - Manian K Marappan & May Soh May En;
M/s K Marappan & Co

For the 3rd respondent - George Neo & Christie Liau; M/s Yeo Chambers

Reported by Lina E

JUDGMENT**Suria Kumar DJ Paul JC:****Introduction**

[1] This litigation concerns a financial institution dragging its panel valuer and solicitor to court for losses suffered.

- A [2] Parties point fingers at each other for the losses suffered by the financial institution.
- [3] The valuer and solicitor would have least expected that one day they would be sued for the losses suffered by the financial institution.
- B **Background Facts**
- [4] This plaintiff is a licensed financial institution under the Financial Services Act 2013.
- [5] The first defendant is a company of chartered surveyors and registered valuers registered with the Board of Valuers, Appraisers and Estate Agents Malaysia.
- C [6] The second defendant is a chartered surveyor and registered valuer practicing under the first defendant company and also a director of the first defendant company.
- D [7] The third defendant is a firm of solicitors, having a branch office in Kluang, Johor.
- [8] It is not in dispute that the second defendant company is the panel valuer whereas the third defendant is the panel solicitor for the plaintiff bank.
- E [9] The background to this action arises from two banking facilities that were granted and released by the plaintiff to one KW Kelly Wood Trading Sdn Bhd (“borrower”) comprising of an overdraft, term loan and letter of credit.
- [10] The first banking facility in the sum of RM4,800,000 for, *inter alia*, the purchase of two units of 1½ storey detached factories at Taman Industri Wawasan, 83000 Batu Pahat, Johor (“Taman Wawasan properties”) and working capital (“Taman Wawasan BF”) *via* the plaintiff’s letter of offer dated 2 January 2012 and a supplementary letter of offer dated 29 May 2012.
- F [11] This facility was granted subject to the submission of a valuation report from the plaintiff’s panel valuer for the Taman Wawasan properties, evidencing an aggregate open market value (OMV) of not less than RM3.2 million as a condition precedent.
- G [12] Whereas the second banking facility in the sum of RM12,000,000 for, *inter alia*, the purchase of four units of 1½ storey detached industrial buildings at Taman Industri Sri Sulong (“Sri Sulong properties”) and working capital (“Sri Sulong BF”) *via* the plaintiff’s letter of offer dated 20 August 2013.
- H [13] This facility was granted subject to the submission of a valuation report from the plaintiff’s panel valuer for the Sri Sulong properties, evidencing an aggregate open market value (OMV) of not less than RM8 million as a condition precedent.
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[14] It is not disputed that the first and second defendants were appointed by the plaintiff to prepare valuation reports for both the Sri Sulong properties and Taman Wawasan properties in respect of the above banking facilities. A

[15] It is also not disputed that the third defendant was appointed by the plaintiff to prepare loan documentation in respect of the above banking facilities. B

[16] In summary, the plaintiff's claim against the defendants is:

- (i) that the first and second defendants had wrongfully, negligently and/or fraudulently prepared valuation reports stating that the market value for Sri Sulong properties is RM12,000,000 and for Taman Wawasan properties is RM3,200,000 when in fact the actual market value is substantially lower; C
- (ii) the evidence of the first and second defendants having overvalued the Sri Sulong properties by 208% and Taman Wawasan properties by 78% itself amounts to conclusive and decisive evidence of fraud; D
- (iii) in the alternative, the plaintiff contends that the first and second defendants grossly, deliberately and unreasonably inflated the valuations and there is no reasonable basis for their valuation;
- (iv) therefore the first and second defendants had breached the duty of care owed to the plaintiff as their panel valuer; E
- (v) whereas the third defendant, in their capacity as solicitors for plaintiff, had, *inter alia*, wrongfully and/or negligently advised the plaintiff to release the banking facilities to the borrower the knowing that the plaintiff would rely on their advice; F
- (vi) the third defendant failed to ensure the documents prepared by them complied with the plaintiff's requirements and failed to examine the borrower's documents carefully to protect the plaintiff's interest before advising the release of the banking facilities to the borrower; G
- (vii) consequently, the third defendant had breached its contractual duties and duty of care owed to the plaintiff under the service-level agreement.

Analysis And Finding

The Plaintiff's Claim Against The First And Second Defendants H

[17] To establish the claim against the first and second defendants, the plaintiff relied on the following breaches committed by the first and second defendants in preparing the valuation reports:

- (i) failing to comply with the Malaysian Valuation Standards; I
- (ii) relying on the wrong sales evidence;
- (iii) apportioning the market value wrongly.

A *Non-compliance With The Malaysian Valuation Standards*

[18] The Malaysian Valuation Standards (“MVS”) are made under the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 and the Valuers, Appraisers and Estate Agents Rules 1986.

B **[19]** All registered valuers are obliged to follow the provisions contained in these standards.

[20] According to the plaintiff, the first and second defendants breached the following standards of the Malaysian Valuation Standards (“MVS”):

- C**
- (i) standard 11.2.1(i) (f);
 - (ii) standard 11.2.1(ii)(B)(a-e); and
 - (iii) standard 11.2.1(iii)(a-d).

[21] For easy reference, these standards are reproduced below:

D (i) standard 11.2.1(i)(f):

11.2.0 Statements Of Standard

E 11.2.1 The Valuer should use appropriate approach(es) or method(s) of valuation in carrying out his valuation: Where possible more than one approach or method should be used. In using the appropriate or method(s) of valuation the following are to be considered:

(i) **Comparison Approach**

...

F (ii) The Valuer shall have regard to and disclose any prior registered transaction of the subject property, within two years of the valuation

(ii) standard 11.2.1(ii)(B)(a-e):

B. Residual Method

G (a) The estimated gross development value for the property must be established by reference to prevailing sale values for similar properties. Such evidences must be shown in the report.

H (b) Costs of development used in arriving at the net development value of the property must be supported by evidences of such costs that are available for comparable properties or by data compiled, verified, analysed and kept by the Valuer.

(c) The timing of the development, including the phasing of the development must be supported by data compiled, verified, analysed and kept by the Valuer.

I (d) Discount rates used in the valuation must be market derived and supported by adequate reasoning.

(e) The method must be shown in the report.

(iii) standard 11.2.1(iii)(a-d)

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(iii) **Cost Method**

(a) Buildings, structures and improvements

comparable cost data as are available to estimate the cost new or all buildings, structures and improvement to the site must be compiled, verified, analysed and kept by the Valuer.

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(b) Depreciation/Obsolescence allowance

The Valuer shall state the amount of depreciation or obsolescence deducted.

C

(c) Land

Same requirements as stated in the requirement of Comparative Method.

(d) The method must be shown in the report.

[22] Standard 11.2.1(i)(f) of the MVS requires the first and second defendants to have regard to and disclose any prior registered transaction of the subject property within two years of their valuation.

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[23] However, the plaintiff submits that the first and second defendants failed to do so and thus, they are in breach of this standard.

E

[24] The second defendant (DW1) in his cross-examination agreed that the valuation report prepared by him for the Sri Sulong properties and Taman Wawasan properties does not state any prior registered transactions within two years of his valuation.

[25] Conversely, PW5, called by the plaintiff as an expert valuer, had stated in his report two prior registered transactions within two years of the valuation for both the Sri Sulong and Taman Wawasan properties as required by this standard.

F

[26] Whereas standards 11.2.1(ii)B(e) and 11.2.1(iii)(d) of the MVS require the cost method and residual method to be shown in the valuation report.

G

[27] Although the second defendant (DW1) testified that he had adopted these methods in their internal file, however, it is not stated in his report.

[28] The second defendant also agreed in his cross-examination that these methods are not stated in his report.

H

[29] Hence, the plaintiff submits that the first and second defendants have breached this standard by failing to state the purported adoption of the residual method and cost method in their valuation report.

[30] The plaintiff further submits that the second defendant's (DW1) testimony that he had adopted these methods in their internal file is merely an afterthought to justify and salvage the first and second defendants' wrongful valuation.

I

A *Relying On Wrong Sales Evidence*

[31] Next, standard 11.2.1(i)(b) and (c) of the MVS requires the first and second defendants to select similar properties as sales evidence and disclose, amongst others, the consideration for those transactions.

B [32] According to the plaintiff, the sales evidence in the first and second defendant's valuation reports are wrong and/or unsuitable as they are not of "similar properties" as they differ in land sizes, transacted purchase price and locations. In addition, it also contains false disclosure of the consideration for the said transactions.

C [33] The plaintiff further submits that based on the sales evidence relied upon by the first and second defendants, they could not have arrived at the valuation contained in their valuation reports since the majority of sales evidence relied upon by the first and second defendants concerns much larger pieces of land with much lower transacted price.

D [34] Hence, the plaintiff submits that the first and second defendants have breached standard 11.2.1(i)(b) and (c) of the Malaysian Valuation Standards.

[35] In my judgment, the first and second defendants have failed to provide any good and cogent explanations as to why they failed to comply with these standards.

E [36] In addition, I find the second defendant's (DW1) answers during his cross-examination as to why he did not comply with these standards is evasive and not credible.

Apportioning Market Value Wrongly

F [37] The first and second defendants had apportioned the market value of the properties separately as "improved land" and "building", which is not a common practice for valuers and not provided for in the Malaysian Valuation Standards.

G [38] The first and second defendants were not able to produce any basis or method to justify the apportionment of the market value based on the improved land and building methodology.

[39] When cross-examined by the plaintiff's counsel on this point, the second defendant (DW1) was not able to show that this methodology was allowed and recognised in the Malaysian Valuation Standards.

H [40] Further, in respect of the first and second defendants' remark in their valuation report that this apportionment can only be considered arbitrary and should not be taken as separate values for the lands and buildings, the plaintiff submits that this is without any basis.

I [41] The court finds that the first and second defendants are unable to prove that this methodology of apportionment is an accepted and recognised practice in the property market and real estate industry.

[42] In addition, the second defendant also testified that he took into account several factors such as the Sri Sulong properties are situated in an established Sri Sulong industrial area, its infrastructures are equivalent to or better than the Tongkang Pechah industrial area, distance to highways and traffic congestion in support of his valuation. A

[43] The first and second defendants at the trial called an officer (DW3) from the “Jabatan Penilaian dan Perkhidmatan Harta Batu Pahat (JPPH)” to give evidence in respect of the Department’s data for the valuation of the Sri Sulong properties and Taman Wawasan properties since the first and second defendants had stated JPPH as their source in their valuation reports. However, DW3’s evidence was not of any assistance and the parties did not rely on these data in their submissions. B C

[44] In my judgment, even if the first and second defendants had relied on the data from JPPH, these records are only a guide for the valuers and do not derogate their duty to conduct a professional valuation expected of an ordinary skilled valuer. D

The Plaintiff’s Expert Evidence In Respect Of The First And Second Defendants’ Valuation

[45] The plaintiff called an independent valuer from CH Williams as their witness (PW5) to give expert evidence on the valuation of the Sri Sulong properties and Taman Wawasan properties as at the material date it was valued by the first and second defendants at the request of the plaintiff. E

[46] PW5 prepared separate valuation reports for the Sri Sulong properties and Taman Wawasan properties. F

[47] PW5 valued the Sri Sulong properties at RM2.6 million (RM650,000 each) as at 18 September 2013 in his valuation report dated 23 August 2019 and the Taman Wawasan properties at RM1.8 million (RM900,000 each) as at 24 May 2012 in his valuation report dated 23 August 2019. F

[48] According to the plaintiff, their expert (PW5) had complied with all the standards under the Malaysian Valuation Standards and his valuation is substantiated with the appropriate sales evidence and rightly reflects the open market value of the properties. In addition, PW5 also considered the prior registered transaction of the properties within two years and disclosed it in his report, unlike the first and second defendants. G H

[49] Furthermore, PW5 adopted the comparison approach and relied on similar properties in terms of the same locality and proximity, land area and transaction period between 2012 and 2013 for the Sri Sulong properties and transaction period between 2011 and 2012 for the Taman Wawasan properties as his basis for sales evidence amongst others. I

- A [50] In summing up on this issue, the plaintiff submits that PW5's valuation reports are more reliable and should be accepted. Furthermore, the first and second defendants failed to adduce any independent expert evidence to rebut PW5's expert report, as such it remains unchallenged. In support of their submission, the plaintiff relied on the case of *Bank Kerjasama Rakyat Malaysia v. Daya Plaza Sdn Bhd; Empire Possession Sdn Bhd (Intervener)*
- B [1998] 5 CLJ 79 by Ariffin Zakaria J (as he then was) wherein His Lordship held as follows:
- C ... Since this issue involves the valuation of the said lands, therefore, it is necessary for the defendant to submit its own valuation report to challenge the valuation report submitted by the plaintiff. This was not done. In the circumstances, the court is left with no alternative but to accept the valuation report submitted by the plaintiff.
- D [51] In addition to the above, the testimony by the second defendant, who is a party to the suit and is an interested party, cannot rebut or challenge the plaintiff's expert (PW5's) evidence. He cannot give evidence as an expert on his behalf. The Federal Court's in *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580; [2017] 5 MLJ 292 held as follows:
- E It is our finding that both the plaintiff's witnesses, PW2 and PW3, fell far short of the required standard of an expert witness under s 45 of the Act. PW2 was the senior manager and PW3 the plaintiff's CEO and director. Both witnesses can hardly be described as independent. *As members of the plaintiff's senior management team they should have been treated as having an interest in the case. This fact by itself should have disqualified them as truly independent witnesses.* (emphasis added)
- F [52] The first and second defendants called a registered valuer from Bahari & Co (DW2) to testify on their behalf in support of their valuation for the Sri Sulong properties and Taman Wawasan properties located in Mukim Simpang Kiri, Batu Pahat.
- G [53] DW2 produced five valuation reports, which were prepared by him for five properties in Mukim Simpang Kanan, Batu Pahat, Johor, on the instruction of Malayan Banking Berhad.
- H [54] According to DW2, he was instructed by the bank to ascertain the market value of the five properties for mortgage financing purposes and he had valued each property at RM2,000,000 as of 12 June 2015 by using a similar comparison from the newly built phase in Mukim Simpang Kiri, Batu Pahat.
- I [55] The plaintiff objected to the production of the first and second defendants' valuation reports prepared by DW2 during the trial on the grounds of failing to comply with the requirements under O. 40A of the ROC 2012 when adducing expert evidence.

[56] In response to this objection, learned counsel for the first and second defendants conceded that these valuation reports adduced through DW2 are not expert reports but are similar fact evidence.

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[57] However, DW2, in his testimony during cross-examination, testified that the reports were his professional and expert view as a valuer.

B

[58] The court finds that the valuation reports adduced through DW2 certainly cannot be an expert report to rebut the plaintiff's expert report prepared by PW5. This is because these valuation reports do not concern the market value of Sri Sulong properties and Taman Wawasan properties at the material date in question when it was valued by the first and second defendants.

C

[59] Furthermore, there was non-compliance by the first and second defendants of O. 40A of the ROC 2012 with regards to adducing expert evidence and such it cannot be accepted in evidence. In *Amzed Development Sdn Bhd v. Dato' Mat Jahya Hussin & Anor* [2021] 5 CLJ 149; [2020] MLJU 2125, it was held by the Court of Appeal as follows:

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[45] Besides, in trying to prove damages, the Respondent called PW 3, the registered valuer. Without PW 3, damages would not be proven. *PW 3 acted as an expert witness as he is in the specialised field regarding the valuation of properties. He must be treated as an expert witness. Therefore, he must be subjected to the rule regarding such witness.* There is no dispute that before PW 3 testified at the High Court, O. 40A r. 3 of the Rule of Courts 2012 was not complied with by the Respondents in calling PW 3 as a witness. This provision states as follows:

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...

[46] There is no dispute that PW 3 did not affirm an affidavit as required by the above provision. Besides, the report must contain the particulars as listed in the same. *As this was not complied with, PW 3's testimony should not have been accepted by the High Court. Obviously the provision was enacted for it to be followed. It was not enacted for the same to be ignored or to be taken lightly* (see the cases of *Goh Chin Chai v. Goh Seng Chan* [2016] 1 LNS 1660, *Teoh Ah Cha v. Huatson Sdn Bhd* [2018] 1 LNS 1037 and *Tan Siew Hong v. Mohd Azli Abdul Hamid* [2018] 1 LNS 2143). (emphasis added)

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[60] I therefore rule that DW2's evidence is inadmissible. Hence, without there being any independent expert evidence adduced by the first and second defendants to challenge the plaintiff's expert (PW5) evidence in respect of the Sri Sulong properties and Taman Wawasan properties, the plaintiff's expert evidence remains unchallenged and is accepted. In *JLA Motorsports Sdn Bhd lwn. Ahmad Suhaimi Abdullah & Yang Lain* [2020] CLJU 689; [2020] 1 LNS 689, it was held by Ahmad Kamal J as follows:

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- A [79] *Mahkamah mendapati SP1 dan SP6 adalah saksi pakar dan tidak berkepentingan. Mereka telah memberi keterangan, disoal balas oleh peguam*
 B *Defendan yang terpelajar dan telah memberi penjelasan tentang dapatan dan kesimpulan yang telah dibuat berdasarkan pemeriksaan dan laporan pakar yang telah disediakan oleh mereka dan oleh yang demikian mahkamah mendapati tiada sebab untuk tidak mempercayai keterangan SP1 dan SP6 tersebut.*
- [80] *Apatah lagi keterangan SP1 dan SP6 tersebut tidak dicabar dan disangkal oleh Defendan dengan membawa keterangan pakar yang lain.*
- C [81] *Mahkamah Rayuan dalam kes Ong Hooi Beng & Ors v. PP [2015] 1 LNS 63; [2015] MLJU 22 telah berkata:*
In any event expert opinion must be challenged by another expert. The challenge in cross examination if at all of an expert witness is merely to lay the groundwork for the evidence of another expert if called.
 ...
- D [84] *Oleh yang demikian, dengan ketiadaan keterangan dan laporan pakar yang dikemukakan oleh Defendan untuk menyanggah dan mencabar keterangan dan laporan pakar SD1 dan SD6 tersebut, mahkamah berpandangan dapatan dan kesimpulan yang dibuat oleh SP1 dan SP6 serta laporan pakar mereka sewajarnya diterima oleh mahkamah.*
 (emphasis added)
- E *The Second Defendant's Evidence Is To Be Treated With Caution*
- [61] The plaintiff also submits that the second defendant's (DW1) evidence must be treated with caution since he is a party to this suit and in addition a director and shareholder of the first defendant company and therefore has
- F a vested interest in the outcome.
- [62] The plaintiff further submits that the second defendant (DW1) was prepared to say anything during his cross-examination to exculpate himself from any liability.
- G [63] According to the plaintiff, this can be seen from the second defendant's (DW1) testimony during cross-examination reproduced as follows:
- (a) *D2's Cross-Examination at page 44 of Notes of Proceedings dated 6.12.2022*
- CA You're not sure? Alright. I, since you're not sure, Mr Lau, alright? *I put it to you that the bank would expect its panel valuers to*
- H *carry out its duties properly and to protect the bank's interest. Would you agree with that?*
- LAU No.
- (b) *D2's Cross-Examination at pages 63 of Notes of Proceedings dated 6.12.2022*
- I CA I think you didn't hear my question, Mr Lau. I repeat. I'm saying generally speaking, as a panel valuer, is it reasonable for the bank to expect that its panel valuer will carry out its valuation without overvaluation? I'm not talking about your valuation.

LAU *I don't know about that.*

A

(c) *D2's Cross-Examination on page 63 of Notes of Proceedings dated 6.12.2022*

CA Still on the valuation report. At the bottom left hand side, am I right to say that the data source, the source of your data is JPPH? Is that right or is that wrong?

B

LAU *That is a typing error lah.*

(d) *D2's Cross-Examination on page 85 of Notes of Proceedings dated 6.12.2022*

CA Oh, now it's normally you'll put the clause there. So, you know what I'm going to ask you? So, my point is this, as you rightly pointed out, Mr Lau, that clause cannot be found in the Sri Sulong properties. Do you agree?

C

LAU *It's a typing error. I think the omitted, my clerk.*

CA *Another typing error.*

(emphasis added)

[64] I agree with the plaintiff's submission on this point that the second defendant's evidence must be treated with caution.

D

The Standard Of Care Expected Of An Ordinary And Prudent Valuer

[65] Whereas the first and second defendants submit that the plaintiff has failed to prove its case of negligence against them on a balance of probabilities.

E

[66] According to the first and second defendants, the plaintiff failed to adduce any evidence in respect of the standard of care to be expected when the Taman Wawasan and Taman Industri Sri Sulong properties were valued as collateral security to obtain the banking facilities to enable the court to decide as a matter of law what the standard of care was expected by the profession from a prudent valuer and whether the second defendant had failed to measure up to that standard.

F

[67] In making this submission, the first and second defendants rely on the decision in *Alliance Bank Malaysia Bhd v. Yap Koo Kong & 2 Ors* in Kota Kinabalu High Court, Civil Suit No. K22-101-2005-II (TAB 1, BOA) wherein Justice Clement Skinner (as he then was) held:

G

The test is whether Mr. Molikun measured up to the standard of the ordinary skilled man exercising and professing to have the special skill in valuing the property. And in deciding this question, the standard by which Mr. Molikun must be measured is the standard expected of those in the same profession ...

H

*As I pointed out earlier, valuation is not a precise science but one of informed opinion where two able and experienced men, each confronted with the same task might come to different conclusions without one saying that the other lacked competence and reasonable care as was said in *Singer & Friedlander Ltd. v. John D Wood* [1977] 2 EGLR 84.*

I

(emphasis added)

- A [68] Whereas the plaintiff's expert witness (PW5) in his testimony has commented in detail on the method adopted by the first and second defendants in arriving at the market value for the Sri Sulong properties and Taman Wawasan properties using the wrong sales evidence as inappropriate.
- B [69] According to PW5, the methodology which must be used in carrying out valuation is the comparison approach and in using this approach, the valuer must take particular note that comparable properties must be for similar properties within the same locality.
- C [70] PW5 also further testified that recent transactions and asking prices of similar properties in the locality must be analysed for comparison purposes with adjustments made for different locations, sizes, ages and conditions of units and buildings, tenure, title restrictions, if any, and other relevant characteristics to arrive at the open market value.
- D [71] As such, I find the plaintiff has adduced enough evidence through PW5 in respect of the standard of care to be expected from the first and second defendants as a prudent valuer when valuing the Sri Sulong properties and Taman Wawasan properties.
- The Claim Based On Fraud*
- E [72] The plaintiff elected not to proceed with their claim based on conspiracy to defraud.
- F [73] However, the plaintiff submits that evidence of the first and second defendants having overvalued the Sri Sulong properties by 208% and the Taman Wawasan properties by 78% by itself amounts to conclusive and decisive evidence of fraud.
- G [74] In making this submission, the plaintiff rely on the case of *Khoo Cheong Puay v. The Oversea Chinese Banking Corporation Ltd & Ors* [1935] CLJU 26; [1935] 1 LNS 26; [1935] 1 MLJ 93 wherein Mills J had this to say:
- G I hold that, if the plaintiff is **to succeed on the allegation of fraud**, he must prove that on the 5th July, 1932, the consideration of \$50,000 was such a **gross under-valuation as to be in itself conclusive and decisive evidence of fraud.** (emphasis added)
- H *Reliance On The Valuation Reports Prepared By The First And Second Defendants Led To Losses*
- I [75] Next, the plaintiff submits that they relied totally on the valuation reports prepared by the first and second defendants as their panel valuer since the valuer owed a duty to advise them professionally.
- I [76] The plaintiff submits that in reliance on the valuation reports for the Sri Sulong properties and Taman Wawasan properties prepared by the first and second defendants, they suffered losses.

[77] According to the plaintiff, the losses suffered by them only came to light from the foreclosure prices they obtained from the sale of these properties by the liquidator of the borrower company. The borrower company was wound up under the recovery proceedings commenced by the plaintiff. A

[78] For the Sri Sulong properties, the liquidator only managed to obtain RM1.42 million (RM355,000 for each property) and for the Taman Wawasan properties, they only obtained RM2.1 million (RM1.05 million for each property). B

[79] In summing up their claim for negligence against the first and second defendants, the plaintiff relies on the following authorities: C

- (a) The House of Lords case of *Hedley Byrne & Co. Ltd Appellants; and Heller & Partners Ltd Respondents* [1964] AC 465, where it was highlighted that:

Held, that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment. D E

- (b) *Yianni v. Edwin Evans & Sons* [1982] QB 438, the Court held:

Finally counsel said that the plaintiffs should be held guilty of contributory negligence because they failed to have an independent survey, made no inquiries with the object of discovering what had been done to the house before they decided to buy it, failed to read the literature provided by the building society and generally took no steps to discover the true condition of the house. It is true that the plaintiffs failed in all these respects, but that failure was due to the fact that they relied on the defendants to make a competent valuation of the house. I have been given no reason why they were unwise to do so. I have earlier read the paragraph under the heading 'Valuation' in the building society's handbook which Mr Yianni did not read. No doubt if the paragraph had been in stronger terms, and had included a warning that it would be dangerous to rely on the valuer's report, then I think that the plaintiffs might well have been **held to be negligent**. But, in my judgment, on the evidence the allegation of contributory negligence fails. (emphasis added) F G H

Finding Against The First And Second Defendants I

[80] In my judgment, the plaintiff has failed to prove fraud on the balance of probabilities against the first and second defendants. There is no evidence to substantiate the allegation of fraud by the first and second defendants.

- A [81] However, I find that the plaintiff has succeeded on the balance of probabilities to prove that the first and second defendants have grossly inflated the valuation of the Sri Sulong properties and Taman Wawasan properties, which indicates want of proper standard of care and duty on their part owed to the plaintiff bank.
- B [82] I find support in the case of *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109, wherein it was held by His Lordship Edgar Joseph Jr (as he then was):
- C There is authority for saying that a sale at an undervalue is not automatically set aside. (See *Davis v. Taytlor* [1948] 48 SR (NSW) 514; *Kennedy v. De Trafford* [1897] AC 180). **But, the undervalue may be so gross as to indicate fraud or, at least, want of proper standards of care.** (See *Campbell v. Campbell* [1916] 21 CLR 308). (emphasis added)
- D [83] Although the above authority refers to gross undervalue, in my judgment, the want of proper standards of care must equally apply to gross over-valuation.
- E [84] It is my finding that the failure by the first and second defendants to adhere to the relevant standards in the Malaysian Valuation Standards, to adopt the correct and similar sales evidence and to apportion the market value wrongfully led to gross over-valuation of the properties.
- F [85] The explanations given by the second defendant (DW1) in his testimony in respect of his failure to adhere to the relevant standards in the Malaysian Valuation Standards, to adopt the correct and similar sales evidence and to apportion the market value on the “improved land” and “building” is not credible and acceptable.
- G [86] I also find the second defendant (DW1) is not a credible and truthful witness from my observation of his demeanour and his answers during cross-examination. DW1 was evasive in his answers to the questions posed by the plaintiff’s counsel.
- H [87] I find a lack of proper standards of care in the preparation of the valuation reports for the Sri Sulong properties and Taman Wawasan properties on the part of the first and second defendants.
- I [88] They failed to exercise reasonable care in determining the true open market value of these properties. The first and second defendants were not careful and honest in the preparation of the reports. Please see *Bank Bumiputra Malaysia Bhd v. Yeoh Ho Huat* [1977] CLJU 11; [1977] 1 LNS 11.
- [89] As a result, the values of these properties were inflated and did not reflect the true open market value at the material time.
- [90] The first and second defendants, in valuing the properties, ought not to place reliance on the transacted price of the properties in the sale and purchase agreements and adopt the transacted price as the open market value

without carrying out a proper valuation to satisfy whether the plaintiff's condition precedent on the minimum open market value as security for the banking facilities is met.

[91] The authority relied on by the first and second defendants in *Alliance Bank Malaysia Bhd (supra)* does not exempt a valuer of the standard expected from a valuer to use reasonable care in coming to the valuation which he was employed to make and he must be taken to have held himself out as possessing the experience and skill required to value the particular property (please see *Baxter v. FW Gapp & Co Ltd* [1938] 4 All ER 457).

[92] In addition, this authority also does not exempt the requirement for a valuer to take reasonable care to give a reliable and informed opinion on the open market value of the land in question at the date of valuation (please see *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co Ltd* [1995] 2 All ER 769).

[93] Furthermore, the facts in *Alliance Bank Malaysia Bhd (supra)* reveal that there was no big difference between the forced sale value arrived at by the valuer and the proceeds realised from the sale of the properties. As such, based on the facts of that case, which did not concern gross over-valuation, the learned judge held that two different valuers may arrive at different valuations without saying the other lacked competence and reasonable care and found the valuer in that case did not breach the standard expected of an ordinary skilled valuer. Unlike in our present case, the value of the Sri Sulong properties was grossly inflated by 208% and the Taman Wawasan properties by 78%.

[94] Last but not least, it is my finding that based on the purpose for which the valuation was sought by the plaintiff, surely the first and second defendants would have known that the valuation reports prepared by them would be acted upon by the plaintiff and that the plaintiff would rely on the special skill possessed by the first and second defendants. The plaintiff's letters of offer for the banking facilities to the borrower stipulate the minimum open market value expected by the plaintiff for the Sri Sulong properties and Taman Wawasan properties. Please see *Bank Bumiputra Malaysia Bhd v. Yeoh Ho Huat* [1977] CLJU 11; [1977] 1 LNS 11.

The Plaintiff's Claim Against The Third Defendant

[95] The plaintiff submits that the third defendant, as their panel solicitors, had breached their duties and obligations under the service-level agreement.

[96] The relevant clauses in the service-level agreement relied on by the plaintiff are produced below:

- (a) Attachment A (1) provides that "Service-level Targets are measured from the time of instruction/request to the appointed lawyer to prepare and complete documents to the issuance of the advice of release or draw down of the approved banking facilities"

- A (b) Under the “GENERAL REQUIREMENTS OF MAYBANK”, it is also stated, amongst others, that:
- Appointed lawyers are also expected to ensure the following as and when you accept appointment/instructions to handle documentation and *disbursements of the loans* for Maybank.
- B please ensure that there is *no conflict of interest* whatsoever arising on the part of your partners, legal assistants or other staff in your undertaking the relevant legal documentation and disbursement;
- please ensure that you *confirm in writing* to the Bank on all the above when advising the Bank’s attorney to execute the legal documentation;
- C *you are expected to have the Bank’s interest as of utmost priority when you advise release of the loan/facility. In the event the Bank’s interest is compromised/prejudiced in any manner whatsoever for reason(s) attributable directly or indirectly to you, the Bank will hold you fully responsible and you are to indemnify the Bank for any and all losses incurred suffered;*
- D all the general instruction/requirements in this Service Level Requirement *will apply to each and every loan/facility matter you have been/will be appointed by the Bank to handle henceforth;*
- all the instructions/requirements in this Service Level Requirement *shall be deemed to form part of, and be in addition to*, whatever letter of specific instruction issued/to be issued to your good firm by the relevant instructing CAC/Branch at any time and from time to time without attaching this Service Level Agreement.
- (emphasis added)
- F [97] According to the plaintiff, under the service-level agreement and the letters of instruction to prepare the loan documentation for the banking facilities granted to the borrower, the third defendant has the following obligations in advising the plaintiff concerning the release of the banking facilities:
- G (a) Ensure that the documents it prepared comply with all the Plaintiff’s requirements and that the Plaintiff is fully protected;
- (b) Act in the best interest of the Plaintiff, safeguard the Plaintiff’s interest and/or place the Plaintiff’s interest as utmost priority;
- (c) Advise and/or alert the Plaintiff on matters at risk to the Plaintiff.
- H [98] As for the Sri Sulong properties, the plaintiff submits that the third defendant had wrongfully and/or negligently advised the release of the banking facilities without regards to the plaintiff’s interest and committed the following breaches:
- I (i) preparing two sets of sales and purchase agreements with different purchase considerations;

- (ii) adjudicating for stamp duty on the lower RM2.6 million consideration sum; A
- (iii) failing to advise the plaintiff of the existence of the RM2.6 million sale and purchase agreement and the memorandum of transfer for the RM2.6 million consideration sum. B
- [99] According to the plaintiff, the third defendant prepared two sets of identical sale and purchase agreements with different purchase prices for the Sri Sulong properties. B
- [100] One set of four sales and purchase agreements of RM2 million each (total consideration of RM8 million), which were submitted by the third defendant to the plaintiff for financing. C
- [101] And another set of four sale and purchase agreements of RM650,000 each (total consideration of RM2.6 million) which were submitted by the third defendant to the Stamp Office (LHDN) to adjudicate stamp duty. D
- [102] This was followed by the third defendant adjudicating the memorandum of transfer based on the RM2.6 million consideration and not on the RM8 million consideration. D
- [103] The plaintiff submits that the third defendant failed to advise them on the existence of the sales and purchase agreement and the memorandum of transfer for the consideration of RM2.6 million and/or provide copies of the same to the plaintiff. E
- [104] Whereas the third defendant submits that the borrower, upon obtaining the second banking facility in August 2013 to finance the purchase of four units of the Sri Sulong properties, requested them to prepare two sets of sale and purchase agreement with different purchase considerations of RM8 million and RM2.6 million, respectively through one of its directors, Tee Wee Sing. F
- [105] The third defendant further submits that the actual price was to remain at RM8 million and the lower consideration of RM2.6 million was merely for purposes of adjudicating the memorandum of transfer to reduce the stamp duty payable by the borrower. G
- [106] DW4, a partner from the third defendant's firm in charge of the preparation of loan documentation, testified that despite his advice to the borrower's director, Tee Wee Sing, to adjudicate at RM8 million, Tee was insistent that the third defendant prepares two sets of the sales and purchase agreement at different consideration sums of RM2.6 million and RM8 million. H
- [107] This led to DW4 contacting the plaintiff's head of business centre, Madam Saraswati, who is also the signatory to the letter of offer for the banking facilities granted to the borrower, to ask her whether she had any I

- A objections to the preparation of the two sets of the sales and purchase agreement at different consideration sums of RM2.6 million and RM8 million. Madam Saraswati informed DW4 that she had no objection.
- B [108] The third defendant then followed up this conversation by sending a letter to the plaintiff dated 6 September 2013. The relevant portion of this letter read:
- We confirm that the Purchaser/Borrower had agreed to execute the Sale and Purchase Agreement at the purchase price of RM8,000,000-00 for all the four (4) units of the factory lots. However, the parties instruct us to adjudicate for stamping at RM2,600,000-00 for all the four (4) units
- C **instead of our advise** to stamp at RM8,000,000-00. (emphasis added)
- D [109] This letter was prepared by the third defendant's conveyancing clerk (DW5) from their Kluang branch office and sent and dispatched by hand to the plaintiff's business centre in Batu Pahat by the third defendant's clerk from their Batu Pahat branch office. It was acknowledged receipt by the plaintiff on 9 September 2013.
- [110] This letter was marked as D2. The plaintiff denied receiving this letter and vehemently objected to the admission of this letter in evidence.
- E [111] The plaintiff was unable to rebut DW5's proof of delivery of this letter to the plaintiff's business centre in Batu Pahat. Furthermore, I do not find the plaintiff's denial that they did not receive this letter credible. The third defendant produced the original duplicate copy of the letter, which had the plaintiff's acknowledgment of receipt and rubber stamp of their business centre in Batu Pahat, which appears genuine.
- F [112] Thereafter, the third defendant prepared the two sets of the sale and purchase agreements for different considerations of RM2.6 million and RM8 million.
- G [113] Next the third defendant forwarded the resolution of RM2.6 million to the plaintiff *vide* their letter dated 11 September 2013 to the third defendant.
- H [114] The third defendant was never questioned by the plaintiff over the RM2.6 million resolution but was merely asked by the plaintiff to use the RM8 million resolution instead. Thus, the third defendant submits that this shows that the plaintiff knew the existence of two sets of the sale and purchase agreements for different consideration sums of RM2.6 million and RM8 million.
- I [115] The plaintiff's witness, PW1, had no personal knowledge of the existence of two sets of the sale and purchase agreements for different consideration sums and the plaintiff failed to call the relevant officers at the material time, who had personal knowledge.

[116] The plaintiff failed to call Madam Saraswati a/p Periasamy and Mr Koh Sze Buan, who were then the head and deputy of the business centre in Batu Pahat or any other personnel from their Batu Pahat Business Centre to refute the third defendant's evidence on the existence of the two sets of the sale and purchase agreement for different consideration sums. A

[117] In addition, the third defendant also submits that the plaintiff was well aware of the borrower's resolution for the RM2.6 million prepared by the company secretary. This is evident from the third defendant's printout of the eLDS, which is the plaintiff's online system, dated 12 September 2013 requesting the third defendant to amend the resolution, which is a day after the third defendant's letter dated 11 September 2013 forwarding the RM2.6 million resolution was sent to them. B C

[118] When PW2, the plaintiff's former head of credit administration, was asked about the "amendment of resolution", he answered as follows:

GN Stated amount purchased at RM650,000 instead of RM2 million as per SPA. Just now, you said the bank didn't know, this is not correct, isn't it? This was stated by the bank. D

ABDUL The thing was forwarded to the bank, right.

[119] In summing up on this issue, the third defendant submits that the plaintiff knew of the lower purchase price of RM2.6 million resolution but did not question the third defendant because the plaintiff knew the existence of the two sets of the sale and purchase agreement for different consideration sums. E

[120] Whereas the plaintiff denies knowledge of the existence of the two identical sale and purchase agreements with different considerations of RM8 million and RM2.6 millions respectively, and also explained that there could have been a typo error on the resolution with the sum RM2.6 million instead of RM8 million. F

[121] I agree with learned counsel for the third defendant that the issue of a typo error on the resolution is not pleaded by the plaintiff. G

[122] In any event, it could not have been a typo error. As submitted by the third defendant, the resolution was prepared by a professional company secretary and the figure RM650,000 was repeated four times in the resolution. Furthermore, the amount stated in the eLDS corresponds exactly with the amount stated in the third defendant's letter dated 6 September 2013. H

[123] Upon analysing the above evidence, it is my finding that the plaintiff knew at the material times of the existence of the two sale and purchase agreements for different consideration sums of RM2.6 million and RM8 million. I

- A [124] As such, the plaintiff cannot now fault the third defendant for carrying out their instructions after being advised by the third defendant that it was wrong.
- B [125] In *Kesang Leasing Sdn Bhd v. Tetuan Zul Rafique & Partners* [2014] CLJU 362; [2014] 1 LNS 362; [2015] 7 MLJ 573, the following passage from *Halsbury's Laws of England: The Law of Solicitor's Negligence*, para. 153, 4th edn, Reissue, was quoted in the judgment:
- C A solicitor is not guilty of negligence if he has merely acted upon his client's instructions in the reasonable belief that they were correct, or if he has fully explained the position to his client and is nevertheless instructed to proceed.
- (Please also see *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 2 CLJ 665; [2017] 1 MLJ 486).
- D [126] In any event, the plaintiff's claim is for losses incurred due to the inflated valuation of the Sri Sulong properties and Taman Wawasan properties by the first and second defendants. The third defendant has nothing to do with these valuations. They have no connection or involvement with the first and second defendants in respect of the valuation for the Sri Sulong properties and Taman Wawasan properties.
- E [127] In addition, the third defendant was only appointed after the plaintiff had already decided and approved to grant the banking facilities to the borrower for the sums of RM12 million and RM4.8 million.
- [128] In the foregoing, I find no merit in this issue raised by the plaintiff.
- F [129] However, I am of the considered view that the advocates and solicitors should refrain from the practice of drawing up two separate agreements for different considerations to pay lesser stamp duty instead of paying the due stamp duty to the Government based on the market value. In *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674, it was held by the Court of Appeal:
- G The two agreements were drawn by a common solicitor and not by the parties themselves. There was also evidence that PW2 had discussed the workings of Act 169 and Act 378 with the parties. PW2 must know that executing the two agreements the way it was done must lead to less tax and less stamp duty payable to the Government and this knowledge must be imputed to the respondent and the appellants. Under these circumstances, both the respondent and the appellants cannot say that they were not aware that their act of circumventing the Guidelines had contravened the relevant provisions of Acts 169 and 378.

I

Conflict Of Interest

[130] The plaintiff submits that the third defendant had acted in conflict of interest and had placed the borrower's interest above the plaintiff's interest in advising the plaintiff to release the Sri Sulong banking facilities. Hence, this amounted to a breach of the service-level agreement.

[131] According to the plaintiff, the conflict of interest arose when the third defendant acted for the plaintiff concerning the loan documentation and also acted for the borrower in the preparation of the sale and purchase agreement.

[132] However, according to the third defendant, the borrower was introduced by the plaintiff themselves to them as their panel solicitor and the third defendant was only retained to prepare documents for the loan obtained by the borrower.

[133] The plaintiff, by introducing the borrower to the third defendant and continuing to instruct the third defendant for the preparation of the loan documents, has shown that the plaintiff acknowledged the possible conflict which might arise and consented to the continuation of the relationship between the third defendant and the plaintiff.

[134] In *Clark Boyce v. Mouat* [1993] 4 All ER 268, the court held that a solicitor was entitled to act for both parties in a transaction even where their interests might conflict provided he obtained the informed consent of both parties to his action. In our present case, it is the plaintiff who introduced its customer, the borrower, to appoint the third defendant's firm as their panel solicitors in respect of the loan documentation for the banking facilities.

[135] This fact was confirmed by the plaintiff's witness, PW2, the head of the plaintiff's credit administration centre commercial, in his evidence produced below:

GN In this case, many documents were filed. Do you agree that there's no letter, or document, that prohibits the Third Defendant from acting in both the SPA and the loan documentation, do you agree?

ABDUL Yes.

...

ABDUL Not to mean they cannot act, actually, **we allow them, it's allowed.** (emphasis added)

[136] Therefore, the third defendant submits that it is wholly inequitable for the plaintiff to say now in hindsight that there was a conflict of interest when it was the plaintiff who allowed this to be done in the first place.

A [137] I find there is no merit in this issue raised by the plaintiff. The plaintiff is now estopped from raising that the third defendant ought not to have acted in preparation of the loan documents after the plaintiff themselves had introduced the borrower and instructed the third defendant to prepare the loan documents.

B [138] Furthermore, the court takes judicial notice that it is also common practice and norm in the banking industry in Malaysia that financial institutions only allow borrowers to appoint solicitors who are on their panel to prepare loan documentation.

C *Failure To Advise The Plaintiff On Related Party Transaction*

D [139] The plaintiff submits that the third defendant was well aware that the borrower and vendor, Yong Hong Development Sdn Bhd, are related parties, as evidenced by DW4, a partner of the third defendant firm's testimony during cross-examination. As such, the third defendant should have alerted the plaintiff and advised accordingly.

[140] Whereas according to the third defendant, the plaintiff's branch in Batu Pahat knew both these companies' directors and shareholders very well. This was confirmed by PW1 in cross-examination as follows:

E GN In light of these, do you agree that the bank in Batu Pahat knew that the purchasers and directors and shareholders of the borrowers were all related? They know them very well.

Tham Yes.

F [141] Furthermore, evidence was led to show that the borrower was part of a group of companies and businesses and a rather big customer of the plaintiff bank. In a short period of five years, the plaintiff had given 28 banking facilities to this group with a total loan sum of more than RM105 million. The borrower won the Golden Eagle Award in 2013, which was jointly organised by Ernst & Young and co-sponsored by the plaintiff. The event had wide coverage by the media. At that time, the relationship between the plaintiff and the borrower was good. The borrower was given, not only further loans but privileges (eg, reimbursement) rarely given to other customers. This fact is confirmed by the plaintiff's witness PW2:

G GN ... My question is this, do you agree that the borrower were given privileges by the bank?

H ...

ABDUL Yes, in this case I would say.

I [142] Evidence was also led to show that the deputy head of the business centre in Batu Pahat, Koh Sze Buan and one of the borrower's directors, Tee Wee Sing, were close and Tee regularly sought Koh's advice on his companies' financing.

- [143] Based on the above evidence that the plaintiff knew the borrower's and vendor's directors and shareholders were all related and have been the bank's customers for several years, the plaintiff themselves had the opportunity to verify and could have verified with the borrower concerning their relationship with the vendor company, Yong Hong Development Sdn Bhd. A
- [144] The plaintiff too could have investigated on their own as to the relationship between the borrower and the vendor company by doing the necessary searches and checking with the Companies Commission of Malaysia. B
- [145] The third defendant was appointed after the plaintiff had approved and granted the banking facilities to the borrower. As such, it is certainly not within the ambit of the third defendant's duty to advise the plaintiff after the plaintiff had already decided to grant the banking facility to the borrower. C
- [146] As such, I find no merit in the plaintiff's argument on this issue.
Wrongly Relying On The Purported Acknowledgment By The Vendor On The Copies Of The Borrower's Cheques D
- [147] The plaintiff submits that the third defendant had negligently advised the plaintiff that difference between the purchase price and loan sum had been fully settled by the borrower. E
- [148] According to the plaintiff, the third defendant ought to have asked for the borrower's statement of account instead to verify that the payment for the differential sum was already made. In other words, the cheques issued by the borrower to the vendor had cleared in the vendor's account.
- [149] According to the third defendant, the plaintiff required the third defendant to produce documents in support of their letter of advice for the release of the banking facilities. F
- [150] Paragraph 4 of the third defendant's letter of advice states, "provided that you (the plaintiff) that all condition precedent ... have either been fulfilled or waived by you, ... we would advise that your bank may now release ...". In other words, the third defendant's advice is conditional upon the plaintiff being satisfied that all the condition precedent were satisfied. G
- [151] For the first banking facility, the third defendant had, by their letter dated 31 May 2012, forwarded to the plaintiff a copy of all the cheques towards payment of the differential sum and two copies of acknowledgment receipts of the said cheques by the vendor. H
- [152] The third defendant further argues that the Credit Administration Centre had accepted all these documents which were forwarded to them and if they were not satisfied or had any queries, they could have asked the third defendant for additional documents but they did not do so. I

A [153] According to the third defendant, the acknowledgment obtained from the vendor concerning payment of the differential sum is what was required by the plaintiff. This was confirmed by the plaintiff's witness, PW2, in his testimony produced below:

B ABDUL It's true. I have to draw the line there because that was the **guideline** that we have, we did not need to check further once have **confirmation have been received from the vendor.**
(emphasis added)

[154] In the foregoing, I find no merit in this issue raised by the plaintiff.

C [155] The plaintiff also argues that the third defendant, in relying on Yong Hong's purported acknowledgments that they have received RM8 million and copies of the cheque from the borrower, was giving wrong advice to the plaintiff since Yong Hong had declared that it only received RM2.6 million (RM650,000 each for Sri Sulong properties) in the memorandum of transfer.

D [156] However, I am not able to accept this argument in light of DW4's evidence that he was asked to prepare two sale and purchase agreements with different considerations of RM8 million and RM2.6 million, respectively. The actual price is to remain at RM8 million as the lower consideration for RM2.6 million was only for purposes of adjudication to reduce the stamp duty payable by the borrower.

E *Failure To Advise The Plaintiff On Irregular Payment By The Borrower*

[157] The plaintiff submits that the third defendant had failed to advise and/or alert them that the purported payment by the borrower to Yong Hong was not by the sale and purchase agreement for the consideration of RM8 million.

F [158] This is because the borrower was supposed to pay the sum of RM3.6 million to the vendor, Yong Hong, at the date of execution on 2 September 2013 and the remaining sum of RM4.4 million to be paid within three months from the date of execution.

G [159] However, based on the copies of cheques provided by the borrower and relied upon by the third defendant in advising the plaintiff to release the Sri Sulong banking facility directly to the borrower, a total of RM5.6 million was purportedly paid between July and August 2013, before the RM8 million sale and purchase agreement was even executed. This can be seen as follows:

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No.	Date	Cheque No.	Amount (RM)	Total (RM)	A
1	15.7.2013	(i) RHB Cheque No. 001262	500,000	2,000,000	B
		(ii) RHB Cheque No. 001261	500,000		
		(iii) RHB Cheque No. 001286	500,000		
		(iv) RHB Cheque No. 001287	500,000		
2	19.8.2013	(i) RHB Cheque No. 001285	400,000	1,600,000	C
		(ii) RHB Cheque No. 001284	400,000		
		(iii) RHB Cheque No. 001264	400,000		
		(iv) RHB Cheque No. 001263	400,000		
3	30.8.2013	(i) RHB Cheque No. 001275	500,000	2,000,000	D
		(ii) RHB Cheque No. 001278	500,000		
		(iii) RHB Cheque No. 001277	500,000		
		(iv) RHB Cheque No. 001276	500,000		
4	11.9.2013	(i) RHB Cheque No. 001245	600,000	2,400,000	E
		(ii) RHB Cheque No. 001246	600,000		
		(iii) RHB Cheque No. 001247	600,000		
		(iv) RHB Cheque No. 001248	600,000		

[160] This plaintiff submits are irregular payments and the third defendant should have alerted and advised the plaintiff accordingly.

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- A [161] However, this is contrary to what the plaintiff's witness, PW2, testified. According to PW2, he was aware that the sum of RM3.6 million was already paid early and it was not a problem for the plaintiff and even if it was a problem, the plaintiff could waive it.
- B [162] I find that the fact that the payment of RM3.6 million was made before the execution of the sale and purchase agreement does not amount to any irregularity if that was the understanding and arrangement accepted and agreed between the parties.
- C [163] What is important is that as of the date of the execution of the sale and purchase agreement, the vendor has already received the sum of RM3.6 million and acknowledged receiving it.
- [164] As such, I find this issue raised by the plaintiff has no merit.
- The Finding Against The Third Defendant*
- D [165] In my considered view, the various attacks made by the plaintiff on the third defendant's purported breach of the expected conveyancing practice under the service-level agreement in advising the plaintiff to release the banking facilities has nothing to do with the valuation, which was grossly inflated by the first and second defendants.
- E [166] The plaintiff suffered losses as a result of the inflated valuation of the properties by the first and second defendants and not as a result of the third defendant's negligence in breach of their duties and obligations under the service-level agreement when advising the release of the banking facilities.
- F [167] The plaintiff has failed to prove causation between the purported breach of the expected conveyancing practice under the service-level agreement in advising the plaintiff to release the banking facilities and the losses suffered as a result of the inflated valuation of the properties.
- G [168] Furthermore, the plaintiff did not adduce any evidence on the established conveyancing practice with regards to the standard of care when advising financial institutions to release banking facilities by calling practicing lawyers. The evidence of PW1 and PW2, who are bankers, is not sufficient to prove professional negligence against the third defendant. In *Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663; [1984] 1 MLJ 126 a claim for professional negligence against a solicitor, the plaintiff called three practicing solicitors to give evidence on conveyancing practice. The collective evidence on the practice relating to how searches should be made on land acquisition was accepted by the court to establish the standard of care required by a prudent solicitor. Thus, in our case, the evidence of PW1 and PW2 alone cannot establish the accepted standard of care expected of the third defendant in advising financial institutions to release banking facilities.
- I

[169] Hence, I find that the plaintiff has failed to prove their claim against the third defendant. A

Doctrine Of Election

[170] The first and second defendants also submit that the plaintiff is estopped from filing this claim against the first and second defendants since the plaintiff had elected to enforce its rights by relying on the loan documents in the recovery actions against the borrower and its directors as guarantors. B

[171] However, the court notes that this issue is not pleaded by the first and second defendants in their defence. As such, the first and second defendants are precluded from raising this issue. The law in respect of parties bound by their pleading is trite. C

[172] In any event, the plaintiff's cause of action against the first and second defendants is premised on the valuation reports for the Sri Sulong properties and Taman Wawasan properties that were negligently and erroneously prepared by the first and second defendants and/or the first and second defendants grossly, deliberately and unreasonably inflated the valuations and there is no reasonable basis for the valuation. D

[173] In my opinion, this is entirely a separate cause of action independent of the loan documentation prepared by the third defendant. E

[174] If there was no inflated valuation in the first place, the plaintiff surely would not have released a loan for a higher sum to avoid incurring losses in the event the borrower defaults.

[175] Furthermore, the banking facilities were granted by the plaintiff to the borrower subject to the valuation of the Sri Sulong properties for not less than RM8 million and Taman Wawasan properties for not less than RM3.2 million as a condition precedent. F

[176] As such, the first and second defendants are not entitled to raise the doctrine of election against the plaintiff on the grounds that the plaintiff had relied on the loan documents for their recovery actions against the borrower and the guarantor. G

Judicial Estoppel And/Or Forum Shopping

[177] Whereas the third defendant submits that the doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior proceeding and the said party is now estopped from asserting an inconsistent position in a subsequent proceeding. H

[178] According to the third defendant, the plaintiff had commenced a similar suit JB-22NCVC-9-11-2020 against the third defendant based on a similar cause of action herein. Before the commencement of suit JB-22NCVC-9-11-2020, a debt recovery action was filed against the borrower, Sentosa Timber Trading Sdn Bhd. The third defendant had prepared the loan documentation for the plaintiff in respect of the borrower in that case. I

A [179] On appeal to the Court of Appeal in their judgment, the suit JB-22NCVC-9-11-2020 was dismissed by the Court of Appeal on the following grounds:

- B (a) took notice that the debt action was premised solely on STT's indebtedness and treated the banking facilities a valid and regular. The Plaintiff a judgment in default and then commenced execution proceedings;
- (b) Unable to recoup its losses, the Plaintiff then filed the suit against the 3rd Defendant and took a different position to one based on negligence, fraud, conspiracy and collusion;
- C (c) Once it is established that a party has adopted a particular stance in an action before the Court, it is estopped from changing that stance in another action.

D [180] In addition, the Court of Appeal referred to the Industrial Court proceedings initiated by Saraswati, the head of the plaintiff's business centre in Batu Pahat at the material time in respect of termination and said:

- E [52] The decision to dismiss Ms Saraswati was made approximately over a year before the claim about this appeal was filed. Her dismissal which was made based on negligence, the recovery/debt action against the first and second defendants under appeal showed the **contradictory positions taken by the plaintiff. The dismissal clearly showed the plaintiff's admission or acknowledgement that its own employee was negligent** in granting the banking facilities to STT ... (emphasis added)

F [181] The bank's application for leave to appeal to the Federal Court in suit JB-22NCVC-9-11-2020 against the decision of the Court of Appeal dismissing the claim was also dismissed.

G [182] The third defendant's submission on this point is also fortified by two prior decisions of the Court of Appeal in *Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd* [2011] CLJU 1853; [2011] 1 LNS 1853; [2013] 2 MLJ 915 and *Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors* [2017] CLJU 499; [2017] 1 LNS 499; [2017] 5 MLJ 63.

H [183] In *Leisure Farm Corp (supra)*, the court confirmed that the object of judicial estoppel is to prevent a party who assumes a particular position in litigation from taking an inconsistent position in later litigation.

I [184] The Court of Appeal in *Leisure Farm* also referred to the case of *Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd* [2011] CLJU 1853; [2011] 1 LNS 1853; [2013] 2 MLJ 915, which clarifies that the essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal.

[185] In the premise, the third defendant submits that this suit herein ought to be dismissed on the grounds it is barred by judicial estoppel. A

[186] I agree with the submission of learned counsel for the third defendant on this point.

[187] It is my finding that the doctrine of judicial estoppel applies against the plaintiff for bringing this claim premised on the loan documentation prepared by the third defendant after having successfully relied on the same documents against the borrower and the guarantors in their debt recovery action. B

[188] In addition, based on the doctrine of *stare decisis*, I am bound by the decision of the Court of Appeal in *Syarikat Rodziah v. Malayan Banking Bhd* [2021] 5 CLJ 170 referred to above. C

Decision

[189] In my judgment, the plaintiff has proven the claim on the balance of probabilities against the first and second defendants for the reasons stated above. The plaintiff's claim against the first and second defendants is allowed with cost. D

[190] As for the plaintiff's claim against the third defendant, I find that the plaintiff has failed to prove their claim on the balance of probabilities for the reasons stated above. I hereby dismiss the plaintiff's claim against the third defendant with cost. E

Damages Against The First And Second Defendants

Sri Sulong Properties

[191] The plaintiff submits that as a result of the first and second defendants' breaches, they suffered losses in the sum of RM10,968,594.85 (as of 1 July 2016, the date the borrower was wound up) in respect of the release of the Sri Sulong banking facility to the borrower after exhausting all the recovery avenues against the borrower computed as follows: F
G

No.	Description	Amount (RM)
1.	Judgment sum (Term Loan 2)	5,664,433.67
2.	Judgment sum (Overdraft 2/Letter of Credit 2/Trust Receipt 2/Bank Acceptance 2/Bank Guarantee)	6,032,181.63
3.	Interest on the Judgment sum of RM5,664,433.67 at the rate of 1.5% per annum above the Bank's Base Lending Rate on monthly rests on compounded basis from 1.12.2015 to 1.7.2016	283,240.53

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A	4.	Additional Interest on the Judgment sum of RM5,664,433.67 at the rate of 1% per annum on monthly rests from 1.12.2015 to 1.7.2016	33,921.02
B	5.	Interest on the Judgment sum of RM6,032,181.63 at the rate of 2.5% per annum above the Bank's Base Lending Rate on daily rests on compounded basis from 1.12.2015 to 1.7.2016	338,603.70
C	6.	Additional Interest on the Judgment sum of RM6,032,181.63 at the rate of 1% per annum on monthly rests from 1.12.2015 to 1.7.2016	36,214.30
	7.	Less: disposal of the Sri Sulong Properties by way of tender exercise	(1,420,000.00)
D		Total	10,968,594.85

[192] In the alternative, the plaintiff prays for the sum of RM5,400,000, being the difference between the valuation by the first and second defendants (RM8,000,000) and the true open market value of the Sri Sulong properties at the date of valuation (RM2,600,000).

Taman Wawasan Properties

[193] Whereas as for the Taman Wawasan properties, the plaintiff submits that as a result of the first and second defendants' breaches, they suffered losses in the sum of RM2,731,140.12 (as at 1 July 2016, the date the borrower was wound up) in respect of the release of the Taman Wawasan banking facility to the borrower after exhausting all the recovery avenues against the borrower computed as follows:

G	No.	Description	Amount (RM)
	1.	Judgment sum (Term Loan 2)	1,566,423.51
	2.	Judgment sum (Overdraft/Letter of Credit/Trust Receipt/Bank Acceptance/Bank Guarantee)	2,991,150.51
H	3.	Interest on the Judgment sum of RM1,566,423.51 at the rate of 1.5% per annum above the Bank's Base Lending Rate on monthly rests on compounded basis from 1.12.2015 to 1.7.2016	78,326.39
I	4.	Additional Interest on the Judgment sum of RM1,566,423.51 at the rate of 1% per annum on monthly rests from 1.12.2015 to 1.7.2016	9,380.41

5.	Interest on the Judgment sum of RM2,991,150.51 at the rate of 2.5% per annum above the Bank's Base Lending Rate on daily rests on compounded basis from 1.12.2015 to 1.7.2016	167,901.88	A
6.	Additional Interest on the Judgment sum of RM2,991,150.51 at the rate of 1% per annum on monthly rests from 1.12.2015 to 1.7.2016	17,957.42	B
7.	Less: disposal of the Taman Wawasan Properties by way of tender exercise	(2,100,000.00)	C
	Total	2,731,140.12	

[194] In the alternative, the plaintiff prays for the sum of RM1,400,000, being the difference between the valuation (RM3,200,000) and the true open market value of the Taman Wawasan properties at the date of valuation (RM1,800,000).

[195] In my judgment, the damages against the first and second defendants cannot be computed based on the judgment sum obtained by the plaintiff against the borrower and guarantors for the outstanding banking facilities due and payable by the borrower and guarantors.

[196] This is because the judgment obtained against the borrower and guarantors was for the banking facility granted and disbursed by the plaintiff to the borrower with interest chargeable as a profit to the plaintiff in the course of their banking business and not to the first and second defendants.

[197] In addition, the two banking facilities granted by the plaintiff were not solely for purchases of the Sri Sulong properties and Taman Wawasan properties but also for working capital of RM4 million and RM1.6 million, respectively.

[198] Hence, the aforesaid judgment sum will not reflect the gross over-valuation of the properties by the first and second defendants that caused losses to the plaintiff.

[199] Hence, in my considered view, the difference between the valuation sum arrived at by the first and second defendants and the true open market value of the Sri Sulong and Taman Wawasan properties determined by the plaintiff's expert valuer (PW5) ought to be taken as the appropriate basis for computing the damages for the losses suffered by the plaintiff as a result of the inflated valuation for both the properties by the first and second defendants.

[200] It is only fair that the plaintiff recovers all other related losses connected to the banking facilities and the special damages for the sum RM35,645.78 from the borrower and or the guarantors as part of the risk in granting the banking facilities to its customer in their ordinary banking business.

- A [201] As for the plaintiff's claim for exemplary and punitive damages, I find no evidence adduced and submissions made for the same. Hence, the claim for exemplary and punitive damages is not allowed.

Whether The Plaintiff Is Contributorily Negligent

- B [202] The first and second defendants did not plead in their defence that the plaintiff is contributorily negligent for the losses suffered.

- C [203] However, the first and second defendants pleaded in their defence that it is a practice in the banking industry for the plaintiff to seek a written or verbal second opinion from other valuers to decide if the valuation conducted by the first and second defendants is accurate and acceptable.

- [204] The first and second defendants also further plead that the plaintiff also has other ways or sources to know the true market value.

- D [205] Although the first and second defendants did not plead contributory negligence by the plaintiff, the court takes note of the plaintiff's experts (PW4) testimony that the usual practice for banks is to get two opinions. The first opinion is to have a feel of the property worth in the market *ie*, market value of the property. PW4 further testified that when this market value is matched with the loan requirement, only then the loan will be processed and instructions given to the lawyers to prepare the loan agreement and to the valuer to come up with the valuation report.

- E [206] In my opinion, surely it would have been prudent for the plaintiff to seek first an opinion to have a feel of the proper worth in the market by making enquiries *ie*, market value of the property before processing to grant the loan. I do not find any such evidence adduced by the plaintiff.

- F [207] In the alternative, instead of just accepting the first and second defendants' valuation reports, it would have been also prudent for the plaintiff to obtain a second opinion after receiving the valuation reports from the first and second defendants since the banking facility for RM12,000,000 and RM4,800,000 respectively granted to the borrower is for a huge sum and the purchase of industrial buildings and not for residential properties.

- G [208] In *Ng Shiuh Huei v. Asset First Sdn Bhd & Anor* [2014] 3 CLJ 1064, Her Ladyship Yeoh Wee Siam J as she then was held:

- H [85] With respect, I do not agree that contributory negligence has to be pleaded by the second defendant here. The issue before this court is whether the second defendant is negligent and, if so, to what extent. If, in the course of evaluating the evidence, the court finds that there is negligence on the part of the second defendant, but also finds that there is contributory negligence on the part of the plaintiff, then in assessing the quantum of damages to be paid to the plaintiff, it would be grossly unjust and wrong for the court to close its eyes to such contributory negligence and award damages based on a 100% liability. I am of the firm view that any contributory negligence by the plaintiff must be considered.

I

[209] It is my finding that the contributory negligence of the plaintiff must be considered. A

[210] In addition, I have also made a finding earlier that the plaintiff knows of the existence of two sets of sale and purchase agreements for the Sri Sulong properties for RM8 million and another for RM2.6 million. B

[211] Apart from this, evidence was also led to show that the plaintiff terminated two of their employees namely, Saraswati a/p S Periasamy and Koh Sze Buan, who were the head and deputy head of the business centre in Batu Pahat due to this incident and for the losses suffered by the plaintiff. C

[212] The court also takes note that in the judgment of the Court of Appeal in Suit No. JB-22NCVC-9-11-2020, which the plaintiff commenced against the third defendant based on a similar cause of action, the plaintiff's negligence was confirmed by the Court of Appeal as follows: D

... the dismissal also clearly showed the plaintiff's admission or acknowledgement that its own employee was negligent in granting the facilities. E

[213] Lastly, evidence was also led to show that the borrower being a big or large customer of the plaintiff given privileges by the plaintiff's business centre in Batu Pahat. The banking facility was disbursed directly to the borrower by the plaintiff although reimbursement was rarely given to the plaintiff's customer. This could have contributed to the plaintiff letting their guard down and not being careful when granting the banking facilities to the borrower. F

[214] As such, in my judgment, the plaintiff must be held equally liable for the losses suffered by them as a result of the difference between the valuation arrived by the first and second defendants and the true open market value. G

[215] In the case of Sri Sulong properties, the liability of the first and second defendants for the difference of RM5,400,000 is to be reduced by 50% to RM2,700,000. H

[216] Whereas in the case of Taman Wawasan properties, the liability of the first and second defendants for the difference of RM1,400,000 is to be reduced by 50% to RM700,000. I

[217] As for interest, I award interest 5% on these sums from the date of judgment being the date on which the court finds the first and second defendants liable for gross over-valuation.

[218] As for cost, the plaintiff I award cost in the sum of RM40,000 against the first and second defendants and the third defendant is awarded cost in the sum of RM50,000 against the plaintiff.